

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: " (SUMMARY ORDER) ." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV](http://www.ca2.uscourts.gov)), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of December, two thousand nine.

PRESENT: DENNIS JACOBS, Chief Judge,
PETER W. HALL, Circuit Judge,
J. GARVAN MURTHA, District Judge.*

CLIFFORD B. MEACHAM, individually and
on behalf of all other persons
similarly situated, THEDRICK L.
EIGHMIE, individually and on behalf
of all other persons similarly
situated, ALLEN G. SWEET,
individually and on behalf of all
other persons similarly situated,

* J. Garvan Murtha, Senior District Judge of the United States District Court for the District of Vermont, sitting by designation.

Plaintiffs-Appellees,

JAMES R. QUINN, Ph.D., DEBORAH L.
BUSH, RAYMOND E. ADAMS, WALLACE
ARNOLD, RONALD G. BUTLER SR., WILLIAM
F. CHABOT, ALLEN E. CROMER, BELINDA
GUNDERSEN, CLIFFORD J. LEVENDUSKY,
BRUCE E. PALMATIER, NEIL R. PAREENE,
MARGARET REYNHEER, JOHN K. STANNARD,
DAVID W. TOWNSEND, CARL T. WOODMAN,

Consolidated-Plaintiffs-
Appellees,

HILDRETH E. SIMMONS JR., HENRY
BIELAWSKI, JAMES S. CHAMBERS, ARTHUR
J. KASZUBSKI, DAVID J. KOPMEYER,
CHRISTINE A. PALMER, FRANK A. PAXTON,
JANICE M. POLSINELLE, TEOFILS F.
TURLAIS, BRUCE E. VEDDER,

Consolidated-Plaintiffs,

-v.-

09-2037-cv

KNOLLS ATOMIC POWER LABORATORY, also
known as KAPL, Inc., LOCKHEED MARTIN,
INC., JOHN J. FREEH, both individually
and as an employee of KAPL and
Lockheed Martin,

Defendants-Appellants.**

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APPEARING FOR APPELLANTS: JOHN E. HIGGINS (Margaret A.
Clemens, on the brief), Nixon
Peabody LLP, Rochester, New
York.

** The Clerk of the Court is respectfully directed to
amend the official caption to conform to the caption of this
order.

1 **APPEARING FOR APPELLEES:** KEVIN K. RUSSELL (John B.
2 DuCharme and Joseph C. Berger,
3 on the brief), DuCharme, Harp &
4 Clark, LLP, Clifton Park, New
5 York.
6

7 Appeal from a judgment of the United States District
8 Court for the Northern District of New York (Homer, M.J.).
9

10 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
11 **AND DECREED** that the judgment of the district court be
12 **VACATED** and the matter **REMANDED** for a new trial on the
13 liability issue only.
14

15 Defendants Knolls Atomic Power Laboratory, Lockheed
16 Martin, and John J. Freeh ("defendants") appeal the judgment
17 of the district court reinstating a prior jury verdict in
18 plaintiffs' favor. Defendants argue that the district court
19 committed clear error in holding that they waived the
20 defense based on reasonable factors other than age ("RFOA"),
21 and that the waiver was not properly excused; they also
22 argue that, if we vacate the waiver and excuse holdings, we
23 should order that judgment be granted in their favor as a
24 matter of law. We assume the parties' familiarity with the
25 underlying facts, the procedural history, and the issues
26 presented for review.
27

28 Vacatur of the judgment is required by adherence to the
29 "mandate rule," which "compels compliance on remand with the
30 dictates of the superior court and forecloses relitigation
31 of issues expressly or *impliedly* decided by the appellate
32 court." United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir.
33 2001) (internal quotation marks omitted) (emphasis in
34 original); see also In re Sanford Fork & Tool Co., 160 U.S.
35 247, 255, 259 (1895). To determine whether a particular
36 issue "remains open for reconsideration on remand, [a] court
37 should look to both the specific dictates of the remand
38 order as well as the broader spirit of the mandate." Ben
39 Zvi, 242 F.3d at 95 (internal quotation marks omitted).
40 "[W]e must always look to the opinion to interpret the
41 mandate." FTC v. Standard Educ. Soc'y, 148 F.2d 931, 932
42 (2d Cir. 1945).

43 In an earlier decision in this case, the United States
44 Supreme Court explained that "the only thing at stake . . .
45 is the gap between production and persuasion" and that this

1 Court "showed no hesitation in finding that Knolls prevailed
2 on the RFOA defense, though the court expressed its
3 conclusion in terms of Meacham's failure to meet the burden
4 of persuasion. Whether the outcome should be any different
5 when the burden is properly placed on the employer is best
6 left to that court in the first instance." See Meacham v.
7 Knolls Atomic Power Lab., 128 S. Ct. 2395, 2406 (2008)
8 ("Meacham SC II"); see also Meacham v. Knolls Atomic Power
9 Lab., 461 F.3d 134, 144 (2d Cir. 2006), vacated by Meacham
10 SC II, 128 S. Ct. at 2407. Waiver principles are
11 analytically antecedent to an analysis on the merits; we
12 therefore read the Supreme Court's opinion as impliedly but
13 necessarily rejecting plaintiffs' waiver argument.

14
15 Our conclusion in this regard finds additional support
16 from the fact that plaintiffs argued forfeiture and
17 abandonment in their brief to the Supreme Court and waiver
18 of the defense at oral argument before the Supreme Court.
19 Brief for the Petitioners at 51-52, Meacham SC II (No. 06-
20 1505); Tr. of Oral Argument at 53, Meacham SC II (No. 06-
21 1505). The Court, therefore, was squarely presented with
22 plaintiffs' waiver argument, and a natural reading of
23 Meacham SC II suggests that it was rejected.

24
25 Our summary order issued in this case, Meacham v.
26 Knolls Atomic Power Lab., Nos. 02-7378-cv, 02-7474-cv, 2009
27 WL 33609 (2d Cir. Jan. 7, 2009) (summary order), requires no
28 different result. That order does not constitute a finding
29 regarding waiver, nor, having re-examined the issue in light
30 of the arguments presented in this appeal, does it preclude
31 us now from determining that the mandate rule forecloses
32 reconsideration of the waiver issue.

33
34 We therefore remand this case to the district court
35 with instructions to hold a new trial and to allow for
36 whatever discovery is necessary for the parties fairly to
37 litigate the issues regarding liability under the law as it
38 currently stands. The uncertainty and multiple changes in
39 the governing law have complicated the issues in this case
40 to such an extent that neither party is entitled to judgment
41 as a matter of law, either on the merits or on procedural
42 grounds.

43
44 We hereby **VACATE** the judgment of the district court and
45 **REMAND** for a new trial on the liability issue only.

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FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK
By:
